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of the

United States

October Term, 1978

NO. 78-684

American Service Corporation, et al.,
Petitioners

v.

United States of America

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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INTRODUCTORY REMARKS

"GM" refers to Memorandum for the United States In Opposition to the Petition For Writ of Certiorari.

All emphasis is supplied.

FLOW OF COMMERCE

The government simply ignores the language of its own indictment. The indictment does not read, as the government inaccurately suggests, that:

> . . . during 1973 some $4 million worth of goods were ordered by petitioners from out-of-state to meet local consumer demand (GM 3).

Rather, the indictment charges that the goods were ordered "in anticipation of the continuing demands of the [petitioners'] customers . . ." (Pet. App. 9).

"Anticipate" is defined to mean: "To consider in advance, give advance thought . . . to." *Webster's Third New International Dictionary* 94 (Philip B. Grave ed. 1969). Anticipation is synonomous with "hope". *Webster's New World Thesaurus* 16 (Charton G. Laird ed. 1974).

Thus, according to the English language, the indictment charges only that out-of-state goods were ordered by defendants with the "advance thought" or "hope" of resale.

However, unless the goods were ordered to fill petitioners' customers' actual orders, or pursuant to pre-existing arrangements between petitioners and their customers, or perhaps, in anticipation of *specific* customers' needs (statements which are absent from the indictment), the wholly intrastate conspiracy could not have occurred in the "flow of commerce." *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 567-570 (1942).

Accordingly, the cases cited by the Government under their flow argument (GM 3) do not apply. In each, it was either alleged that the defendants:

1. Were "conduits" in a continuous stream [of plumbing goods] from points of origin out of state *to places of use and installation [intra-state]. Las Vegas Merchant Plumbers Association v. United States*, 210 F.2d 732, 738 (9th Cir.), cert. denied, 348 U.S. 817 (1954); or

2. Were involved in the sale of goods (liquid asphalt) which were "transported into the state of Kansas in a continuous uninterrupted flow of interstate commerce directly from [Missouri] to *job sites in Kansas.*" *United States v. Wilshire Oil Company of Texas*, 427 F.2d 969, 974 (10th Cir.), cert. denied, 400 U.S. 829 (1970); or

3. Sold merchandise that was in a "continuous and uninterrupted flow . . . from plants located in states other than Florida to [defendants] within the State of Florida and *then to their customers.*" *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1082 (5th Cir.), cert. denied, 98 S.Ct. 3088 (1978).

Thus, restraint of trade *in* the "flow of commerce" was alleged by the indictments in the above cases because specific facts were set forth to show that the out-of-state goods did, in fact, travel *beyond* the defendants' warehouses to the defendants' customers.

Void of any like allegations, the subject indictment was jurisdictionally defective under the flow of commerce theory.

AFFECTS COMMERCE

The Government fares no better under its "affects commerce" theory. Even when viewed as a whole, the indictment, at most, states only that petitioners ordered goods from out-of-state and that their purely local conspiracy affected the flow of linen supplies in interstate commerce (Pet. App. 10). However, this generic "affects" language is meaningless since it omits any factual description of any segment of interstate commerce supposedly affected. *See Russell v. United States,* 369 U.S. 749, 763-765 (1962).

The conclusory "affects" allegation required petitioners, first, to guess at the factual bases of their alleged Sherman Act violation, and then, based upon that guess, to offer a defense. Such an indictment which fails to provide enough information to allow the defendant to prepare an adequate defense is constitutionally defective. *Hamling v. United States,* 418 U.S. 87, 117 (1974).

Thus, notwithstanding the Government's argument that, had a trial been held, it could have proved an effect on "interstate commerce" (GM 3), jurisdictional facts showing what and how interstate commerce was affected needed to be alleged in the first instance. Did petitioners' conduct affect commerce in the out-of-state goods ordered by petitioners before their arrival in Florida (unalleged)? Did petitioners' conduct affect commerce in goods sold by their unnamed and unknown co-conspirators (Pet. App. 10) across state lines (unalleged)? Did petitioners' conduct affect interstate commerce simply because they ordered goods from out-of-state and resold them within the state (unalleged)?

Or, did petitioners' conduct affect interstate commerce in some other way based upon some other unalleged government theory.

Indeed, it was only because the *civil* complaint in *Hospital Building Company v. Trustees of Rex Hospital,* 425 U.S. 738 (1978), cited by the Government,* clearly identified the specific areas of interstate activity which the defendants' conduct affected, that the Court held it to be sufficient. *Id.* at 741.

Conversely, the instant indictment is barren of any factual statement describing any area of interstate commerce which petitioners' alleged wrongful conduct may have affected in violation of the Sherman Act. Absent such allegations, only intrastate commerce remains to be affected by petitioners' activities in possible violation of Florida's anti-trust laws. However, petitioners' disregard for Florida law, touching upon the same general subject matter as a federal act, does not expose them to federal prosecution without proper jurisdictional allegations bringing their wrongful conduct within the operation of federal law. *Blitz v. United States,* 153 U.S. 308 (1894).

*The government cites two other cases in support of its "affects" argument: *Burke v. Ford,* 389 U.S. 320 (1967); and, *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975). In both, the Court addressed itself solely to the sufficiency of proof adduced at trial. The adequacy of the civil complaints was neither questioned nor discussed.

CONCLUSION

Despite the Government's claim that the court of appeals' decision is in "accordance with the decisions of this Court," the Government has not cited one antitrust case to support the jurisdictional adequacy of the instant indictment. Rather, the cases cited by the Government demonstrate that the instant indictment is defective on its face.

By reason of the foregoing, and to preclude the instant indictment from becoming a form of dragnet to be used as a model for Sherman Act indictments, certiorari should be granted and the decision of the court of appeals reversed.

WHEREFORE, we respectfully pray for the granting of the Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the aforegoing were mailed to: JOHN H. SHENEFIELD, Assistant Attorney General, JOHN J. POWER, III, DANIEL J. CONWAY, Attorneys, Department of Justice, Washington, D.C., 20530 and to the Solicitor General, Department of Justice, Washington, D.C. this 29th day of December, 1978.

DANIEL NEAL HELLER